

# HALL & ASSOCIATES

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August 9, 2018

## **VIA FOIA ONLINE**

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

### **RE: FOIA Request for EPA's Legal and Technical Basis for Imposition of Cause or Contribute to Excursion of Water Quality Standard Limitation in MS4 Permits**

To Whom This May Concern:

This is a request for public records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as implemented by the Environmental Protection Agency ("EPA") at 40 C.F.R. Part 2.

### **Background**

EPA has approved and issued MS4 General Permits that include a provision that an MS4 discharges may not cause or contribute to an excursion of a water quality standard (*see, e.g.*, Final 2017 New Hampshire Small MS4 General Permit at 17: "Pursuant to Clean Water Act 402(p)(3)(B)(iii), this permit includes provisions to ensure that discharges from the permittee's small MS4 do not cause or contribute to an exceedance of water quality standards, in addition to requirements to reduce the discharge of pollutants to the maximum extent practicable. [...] The permittee shall reduce the discharge of pollutants such that discharges from the MS4 do not cause or contribute to an exceedance of water quality standards."<sup>1</sup>). EPA has also asserted that it is unlawful and in violation of the Clean Water Act for an MS4 discharge to cause or contribute to an excursion of a water quality standard, even at extremely low quantities (*see, e.g.*, EPA Response to Comments on: National Pollutant Discharge Elimination System (NPDES) General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in New Hampshire at 73, 82<sup>2</sup>). EPA has explained that this provision constitutes a "cause or

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<sup>1</sup> Available at <https://www3.epa.gov/region1/npdes/stormwater/nh/2017-small-ms4-general-permit-nh.pdf>

<sup>2</sup> Available at <https://www3.epa.gov/region1/npdes/stormwater/nh/2017-response-to-comments-sms4-nh.pdf>

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contribute” water quality-based effluent limitation (i.e., “C&C WQBEL”). EPA has further explained that where downstream waters are impaired, compliance with this provision requires, inter alia, achieving the applicable water quality end-of-pipe. We further understand that EPA Headquarters reviewed and approved the C&C WQBEL provision contained in the NH Small MS4 permit.

## Request

This request seeks:

1. Any document explaining what effluent quality must be achieved to attain compliance with a C&C WQBEL.
2. Any EPA documents explaining EPA’s rationale for interpreting CWA Section 402(p)(3)(B)(iii) to require such C&C WQBEL.
3. Any documents addressing the derivation of a C&C WQBEL for MS4 or non-MS4 NPDES permittees.
4. Any document in EPA possession explaining how a C&C WQBEL (i.e., end-of-pipe limitation ignoring dilution and fate and transport factors) was determined to be necessary to ensure downstream water quality standard compliance.

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Documents sought are only those located at EPA Headquarters. Please contact the undersigned if the associated search and duplication costs are anticipated to exceed \$100.00. If the requested documents are withheld based upon any asserted privilege, please identify the basis for the non-disclosure.

If you have any questions regarding this request, please do not hesitate to contact this office so as to ensure that only the necessary documents are duplicated.

Respectfully,

//s// Ben Kirby  
Benjamin M. Kirby